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No. 00-404

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

JULIE DUNCAN,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's entire Brief in Opposition can be reduced to a single proposition: no court of appeals has held that a run-of-the-mill personal injury claim is preempted under section 105(a)(1) of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1). But this is not a run-of-the mill personal injury case. Although respondent's alleged injuries are of a physical nature, she is not merely claiming that she was victimized by some isolated negligent acts. In fact, she sought injunctive relief on behalf of a class composed of flight attendants who have flown on Northwest flights where smoking was allowed. She has thus mounted a direct state-law challenge to the legality of an airline *policy* regarding the rendition of a particular *service*. As a result, the case presents squarely the acknowledged circuit split over the proper definition of the term "service" in the ADA. 49 U.S.C. § 41713(b)(1). Moreover, the case is an ideal vehicle for the resolution of the conflict among the circuits that currently subjects the nation's airlines to an intolerable patchwork of state regulation that is precisely what the ADA was meant to avoid.

1. Respondent does not dispute the essential elements of the circuit split highlighted in the Petition. First, it is undisputed that section 105(a)(1) of the ADA preempts all state laws that have a "significant effect" on airline rates, routes or services. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992). Second, respondent does not dispute – because she cannot – that this includes state law tort claims, like the fraud claim held preempted in *Morales*, *id.* at 386 (rejecting any other rule as "utterly irrational"), the intentional tort claims held preempted in *Travel All Over The World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1434-35 (7th Cir. 1996) and *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998), and the claims of fraudulent inducement and breach

of fiduciary duty held preempted in *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609-11 (7th Cir. 2000), *petition for cert. filed* (U.S. Oct 2, 2000) (No. 00-496). Third, respondent concedes that there is a pronounced conflict among the circuits over the meaning of the term "service" in section 105(a)(1) of the ADA. *See* Br. in Opp. at 6-7. Finally, respondent does not seriously contest the fact that the Ninth and Third Circuits have effectively read the term "service" out of the statute by defining it in a manner that adds nothing to the terms "price" and "route." *See* Pet. App. 4a-7a; *Charas v. Trans Worlds Airlines, Inc.*, 160 F.3d 1259, 1261, 1266 (9th Cir. 1998) (*en banc*); *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186, 194 (3d Cir. 1998).

It follows – and respondent does not deny – that in the Fourth, Fifth, Seventh and Eleventh Circuits, state tort claims concerning airline services such as the provision of food and beverages, carry-on baggage rules, ticketing procedures, and boarding practices are preempted.[1] In the Ninth and Third Circuits, however, where *Charas* and *Duncan* are the rule, the ADA does not ban states from regulating all aspects of such activities because, in those circuits, they are not "services" within the meaning of the ADA.

A recent case out of the Ninth Circuit proves the point. In *Tall Club of Silicon Valley v. American Airlines*, No. C 00-982, 2000 WL 868524 (N.D. Cal. June 19, 2000), an association of persons over 6' 2" tall sought an injunction

[1]*See Smith*, 134 F.3d at 259; *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (*en banc*); *Travel All Over The World, Inc.*, 73 F.3d at 1434-35; *Parise v. Delta Airlines, Inc.*, 141 F.3d 1463, 1465-66 (11th Cir. 1998).

based on state law directing American Airlines to reserve a certain number of seats with extra leg room on each flight. Applying *Charas*, the *Tall Club* court held that the Ninth Circuit's "narrow definition of service substantially limits the scope of preemption under section 41713 . . . ." *Id.* at *3. Accordingly, the plaintiff's claims were not preempted. *Id.* In other words, because seating requirements would not amount to "utility-style regulation," an airline's seating policies are subject to the full range of state regulation in the Ninth Circuit.[2] *See id.* at *3-*4.

By contrast, there can be no doubt that *Tall Club* would have been decided differently under the competing *Hodges* standard, which does not arbitrarily exclude in-flight amenities from the scope of the "services" protected from state regulation under the ADA. *See Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (*en banc*) ("'Services' generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the use of the service. Elements of the air carrier service bargain

[2]As any taller traveler might agree, an airline's decision to provide extra leg room could give that airline a substantial competitive advantage in the marketplace. Consequently, some air carriers might offer more leg room to compete for this segment of the market. Others might not, however, based on the belief that, as a strategic matter, offering more seats on each flight (necessarily with less leg room) will enable them to offer lower fares and thus increase sales. Under the ADA, these are precisely the kinds of business decisions that were meant to be controlled by market forces, not state regulation. *See Morales*, 504 U.S. at 378 (in enacting the ADA, Congress determined that "'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality . . . of air transportation services'") (quoting 49 U.S.C. App. § 1302(a)(4), 1302(a)(9)).

include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling.").

2. Faced with this serious conflict among the circuits over the meaning of a law designed to protect airlines from varying state law regulations, respondent's only answer is to say that there is uniformity over the question whether personal injury claims are preempted. But that is a mere sleight of hand: no court has held that whether a claim is preempted under the ADA turns on the type of harm suffered by the plaintiff. Rather, in all circuits, preemption turns on whether the plaintiff's *claim* significantly affects an airline "service," which in turn depends on the breadth of that statutory term. The type of harm suffered is not determinative. No other rule would be consistent with this Court's reasoning in *Morales*, 504 U.S. at 383-89.

It may be true that the large majority of personal injury claims that might be brought against the airlines are not barred by the ADA. But allowing or disallowing smoking, allowing or prohibiting carry-on baggage, and permitting or restricting alcohol consumption are quite different matters from the way in which such services are provided in a particular instance. Claims based on isolated tortious acts of employees, after all, seldom have a significant impact on airline fares, routes or services. But that does not mean that it makes sense to exclude personal injury claims categorically, or that *any* circuit has so ruled.

Indeed, the Ninth Circuit's ruling in this case itself makes clear that the non-preemption ruling was based on the court's interpretation of the term "service":

> Given our holding in *Charas*, it is clear that allowing smoking on Northwest's trans-Pacific flights does not constitute a "service." An airline's decision to permit (or not to permit) smoking on a flight is not a decision dealing with "the frequency and scheduling of transportation, [or] the selection of markets to or from which transportation is provided." *Charas*, 160 F.3d at 1265-66.

Pet. App. 5a-6a. Thus, even though respondent's claim directly challenged a smoking *policy*, it was allowed to go forward because such a policy was held not to involve a "service." The fact that respondent's alleged injuries happened to be physical in nature had nothing to do with this conclusion.[3]

In light of the court's analysis, it is clear that the *Hodges* court's definition of a service would have dictated a different result. *Hodges* adopted a definition of "service" that expressly included "smoking rules." *See Hodges*, 44 F.3d at 336 (adopting the Civil Aeronautics Board's definition of a service). And, unlike the Ninth Circuit, it recognized the distinction between a direct challenge to an airline's *policy* to provide a service and a challenge to the negligent *manner* in which that service might have been

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[3]When the court went on to determine whether a personal injury claim could ever have the forbidden significant effect on a service, it was assuming that smoking was *not* a service and was asking whether a personal injury claim could ever affect *other* services such as the routes the airline is willing to fly. Pet. App. 6a-7a. That inquiry was appropriate only after the court had first held that smoking was not a service and, therefore, that respondent's claims were not directly preempted. *See id.* Moreover, by concluding that a personal injury suit does not have a significant effect on other services – even where it could be shown that it would in fact force the carrier to alter its routes, *see id.*, – the *Duncan* court effectively created a bright-line rule for personal injury cases that is patently at odds with the analysis employed by the Second, Fourth, Fifth, Seventh and Eleventh Circuits.

performed. In the Fifth Circuit (and others), only the latter survives the ADA's broad preemptive force.[4] *See Hodges*, 44 F.3d at 339 (distinguishing between claims challenging an airline's policy to provide a service, which are preempted, and claims challenging the way in which that service is performed, which are not preempted); *Smith*, 134 F.3d at 259-60 (distinguishing between claims challenging an airline's boarding policies, which are preempted, and those challenging "outrageous conduct" in carrying out those policies, which are not preempted).

Indeed, the best indication of the practical impact of the circuit split with respect to the very claim at issue here is the fact that the district court, applying pre-*Charas* Ninth Circuit cases (which expressly followed the *Hodges* court's broad definition of services), had no difficulty concluding that respondent's claims challenging Northwest's smoking policies were preempted. Pet. App. 12a-17a (relying on *Gee v. Southwest Airlines*, 110 F.3d 1400, 1404-07 (9th Cir. 1997), *overruled by Charas*, 160 F.3d at 1266). After *Charas*, of course, the Ninth Circuit reversed on the ground that smoking is not a "service" under the ADA. Pet. App. 5a-6a. The only difference was the operative definition of a "service" – the very conflict that respondent unpersuasively dismisses as not being outcome-determinative here.

3. In sum, contrary to respondent's claims, there is *no* agreement among the circuits over the application of the ADA's preemption clause to a safety-related tort claim, like

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[4]Because garden-variety negligence claims are not always preempted, it is hardly surprising that Congress has required airlines to have insurance to cover personal injury claims. 49 U.S.C. § 41112. Respondent's reliance on this provision as textual evidence that no personal injury claim can ever be preempted is misplaced.

respondent's here, that directly challenges an airline's policy adopted for the purpose of competing in the marketplace. To the contrary, as respondent concedes, there is a direct conflict over the proper interpretation of the word "service" in section 105(a)(1) of the ADA. And respondent has not denied that the different interpretations necessarily would lead to different results in this case. The effect of the Ninth Circuit's rigid and unprincipled rule would be to allow adoption of plenary state laws regulating many aspects of airline operations down to the last detail – as long as they did not affect the prices an airline charges or the routes it flies. That is precisely what the ADA was intended to prevent. This case thus presents this Court with the perfect opportunity to resolve the circuits' interpretive impasse and to restore the uniform deregulation that the ADA was designed to promote.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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